COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NO. 2015-SC-000144-D

MARY E. MCCANN, INDIVIDUALLY and ON BEHALF OF ALL OTHERS SIMILARLY SITUATED — APPELLANTS

V.

APPEAL FROM THE COURT OF APPEALS
CASE NO. 2014-CA-000392
JEFFERSON CIRCUIT COURT CASE NO. 10-CI-01130

THE SULLIVAN UNIVERSITY SYSTEM, INC. d/b/a SULLIVAN UNIVERSITY COLLEGE OF PHARMACY et al. — APPELLEES

REPLY BRIEF FOR APPELLANT MARY E. MCCANN

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was mailed via U. S. Mail, postage prepaid, this 5th day of April 2016 to: Grover C. Potts, Jr., Michelle DeAnn Wyrick, Emily C. Lamb, Wyatt, Tarrant & Combs, Suite 2800, 500 West Jefferson Street, Louisville, KY 40202, Counsel for Appellees; Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and Honorable Olu A. Stevens, Judge, Jefferson Circuit Court, Division Six, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202. The undersigned further certifies that Appellant has not withdrawn the record on appeal.

Theodore W. Walton

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

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INTRODUCTION

The question presented in this Appeal is whether KRS § 337.385 contains a prohibition on class action lawsuits. The parties to the appeal agree that the text of the statute contains no such prohibition. As Sullivan conceded in the court below, "KRS 337.385 does not state that class actions to recover unpaid wages cannot be filed." (No. 2014-CA-000392, Appellee Br., p.7, n.10 (emphasis added).) "The best way in most cases to ascertain such [legislative] intent or to determine the meaning of the statute is to look to the language used.... Resort must be had first to the words, which are decisive if they are clear." *Gateway Construction Co. v. Wallbaum*, 356 S.W.2d 247, 249 (Ky. 1962). The plain language of KRS § 337.385 does not prohibit class actions, and the Court need not consider the matter further. Nonetheless, Sullivan offers several justifications for reading such a prohibition into the statute. These justifications are unconvincing, as explored further below.

I. LEGISLATIVE INACTION IN THE FACE OF KRS § 337 CLASS ACTIONS IS STRONG EVIDENCE THE COURTS HAVE CORRECTLY INTERPRETED ITS LEGISLATIVE INTENT.

Sullivan dismisses as immaterial the longstanding utilization and acceptance of the class action vehicle in KRS § 337 cases in Kentucky courts. However, rules of statutory construction have long recognized that legislative inaction in the face of judicial interpretations that are purportedly "inconsistent" with the original intent of the legislature is "extremely persuasive evidence" that courts are interpreting the statute consistently with its intent. *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996). This

argument is bolstered by the fact that KRS § 337.385 has been amended on three occasions since its enactment. The 1978, 2010, and 2013 revisions to the statute all made minor tweaks to the statutory language. Had the legislature believed that state and federal courts were overlooking an implicit prohibition on class actions, they would have said so when they revised and reenacted KRS § 337.385 in either 1978, 2010 or 2013.

II. KRS § 337.385 DOES NOT LIMIT ANY WORKERS' RIGHTS OR REMEDIES THAT PRE-EXISTED THE STATUTE.

Sullivan claims that legislature included the words "for and in behalf of" as a way of "limiting" the rights of workers. (Respondent's Br., p.7 n.6.) But Sullivan fails to address the very next statute, KRS § 337.395, which expressly states how KRS § 337.385 is to be interpreted. *Jefferson Cty. Bd. of Educ. v. Fell*, 391 S.W.3d 713, 727 (Ky. 2012)("[W]e are obligated to look beyond one word, one phrase, one sentence, even one statute to the language used in other statutes pertaining to the matter in dispute."). KRS § 337.395 states that KRS § 337.385 sets standards "more favorable" than those that existed prior to the statute. And Sullivan does not seriously dispute that workers had the right to pursue class actions long before the enactment of KRS § 337.385(2). *See Gorley, et al. v. City of Louisville*, 65 S.W. 844, 847 (Ky. 1901)(directing that unpaid wage claims be pursued as a class). In short, any interpretation of KRS § 337.385 that "limits" workers' rights as they existed before the legislature enacted KRS § 337.385 violates KRS § 337.395.

III. KRS § 337.385 SHOULD NOT BE CONSTRUED IN A MANNER THAT WOULD VIOLATE SECTION 116 OF THE KENTUCKY CONSTITUTION.

It is an elementary principle of statutory interpretation that courts presume the legislature did not intend to pass an unconstitutional statute. *Layne v. Newberg*, 841 S.W.2d 181 (Ky. 1992). As such, where a statute is susceptible to two interpretations, one of which would be unconstitutional and the other valid, the Court should adopt the construction which is consistent with the Kentucky Constitution. *Burton v. Mayer*, 274 Ky. 245, 259-260 (Ky. 1938), *Monmouth Street Merchants' Bus Association v. Ryan*, 56 S.W.2d 963 (Ky. 1933); *Caneyville Volunteer Fire Department v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 806 (Ky. 2009). McCann is not challenging the constitutionality of KRS § 337.385(2), as Sullivan argues. Instead McCann is pointing out that Sullivan's strained interpretation of KRS § 337.385(2) would call the statute's constitutionality into serious question. Under well-established rules of construction, Sullivan's interpretation must be rejected.

In federal court, the ultimate authority over the rules of procedure is vested with the legislature. In contrast, under Kentucky's strict separation of powers doctrine, the legislature is prohibited from interfering with the judiciary's adoption and implementation of its own rules of procedure. *Ky Const.* § 116; See also, *Beshear v. Haydon Bridge Co., Inc.*, 416 S.W.3d 280, 295 (Ky. 2013) (Kentucky's Constitution contains arguably the most emphatic separation of power provisions of any state). For instance, pursuant to Section 116 of the Kentucky Constitution, rule-making authority for the judiciary is reserved exclusively to the Courts. *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 578 (Ky. 1995). The legislature has specifically recognized the supremacy of the Court of Justice in matters of procedure. In fact, KRS § 447.154 directs that no statute shall be construed to limit, in any manner, the power of the Court of Justice to set the

procedural rules for the courts. In short, if there is a conflict between Rule 23 and KRS § 337.385, the legislature directs that the conflict be resolved in favor of Rule 23. *Dean v. Gregory*, 318 S.W.2d 549 (Ky. 1958).

IV. KRS § 337.385 DOES NOT CREATE A SPECIAL STATUTORY PROCEEDING.

The only way for Sullivan's "inferred prohibition" on class actions to avoid running afoul of the Section 116 of the Kentucky Constitution is to deem wage-and-hour complaints that are brought in state court "special statutory proceedings." CR 1(2). Special statutory proceedings describe in detail the procedures to be followed by the courts in certain circumstances that are applicable. While wage complaints brought pursuant to the Kentucky Wage and Hour Act are a creation of the legislature, the Act does not "describe in detail" the procedures for wage complaints brought in the courts. *C. C. v. Cabinet for Health & Family Servs.*, 330 S.W.3d 83, 87 (Ky. 2011) (finding DNA paternity actions to be special statutory proceedings because the statute describes in detail the procedures to be followed by the courts). An example of just such a proceeding and one in which class actions may be inappropriate include refunds of *ad valorem* taxes (taxes based on the value of the particular taxpayer's property).

Sullivan curiously cites to *City of Somerset v. Bell*, 156 S.W.3d 321 (Ky. App. 2005) for the proposition that the legislature can restrict the ability to bring statutory claims as class actions. The *Bell* decision arose out of a longstanding and narrow exception to Kentucky's class-action rule. Kentucky courts have long held that class actions could not be brought for refunds of *ad valorem* taxes (taxes based on the value of the particular taxpayer's property). *Swiss Oil Corp. v. Shanks*, 270 S.W. 478 (Ky. 1925);

Board of Education v. Taulbee, 706 S.W.2d 827 (Ky. 1986); *Union Light, Heat & Power Co. v. Mulligan*, 177 Ky. 662 (Ky. 1917); *see also City of Bromley v. Smith*, 149 S.W.3d 403, 406 (Ky. 2004) (distinguishing cases involving *ad valorem* taxes and holding class action procedure available for other types of tax). These cases address sovereign immunity as well as the particular issues unique to *ad valorem* taxes, rendering *Bell* inapplicable to the case at hand. In order to obtain a tax refund for assessments based on the value of property, the statutory enactments specifically require each individual taxpayer to make an application for a refund. KRS § 134.590. If no application for a refund was made and subsequently denied, no suit can be brought. These unique procedures have led Kentucky courts for nearly a hundred years to find that the class-action format and refunds for overpayment of *ad valorem* taxes were incompatible. The Kentucky Wage and Hour Act contains no such procedural prerequisite to receiving unpaid wages. Wage and hour claims are, and always have been, compatible with class actions.

V. NO LEGISLATIVE INTENT TO PROHIBIT CLASS ACTIONS CAN BE INFERRED FROM THE LACK OF "SIMILARLY SITUATED" LANGUAGE IN KRS § 337.385.

Sullivan's brief focuses almost exclusively on the lack of the Fair Labor Standards Act's ("FLSA") "similarly situated" language from KRS § 337.385. 29 U.S.C. § 216 (b). The General Assembly's failure to incorporate certain language is not indicative of legislative intent absent a "clear indication" the General Assembly considered it and "deliberately rejected it." See *Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542, 560 (Ky. 2011). Sullivan continues to refer to the FLSA as "legislative history" for KRS § 337.385. It is not. Legislative history includes the General

Assembly's "committee reports, prior drafts of the statute, bills presented but not passed and legislators' comments in debates." *Jefferson Cty. Bd. of Educ. v. Fell*, 391 S.W.3d 713, 723 (Ky. 2012).

Sullivan does not dispute that the FLSA's "similarly situated" language is part of its unique *collective* action scheme and is not part of the modern Rule 23.[1] Tellingly, Sullivan pays scant attention to the distinctions between FLSA collective actions and class actions brought under Rule 23. McCann's opening brief thoroughly explains the timeline of adoption and subsequent changes to the FLSA, state and federal class action rules, and Kentucky's wage statutes. In the context of this timeline, the most reasonable interpretation is that the legislature did not want to supplant the recently adopted modern class action requirements with the FLSA's unique collective action procedure.

VI. CLASS ACTION LITIGATION IS A CREATION OF THE COURTS.

Relying on *Grzyb v. Evans*, 700 S.W.2d 399, 401 (Ky. 1985) its progeny, and inapposite federal caselaw, Sullivan argues that the right to bring a class action is a substantive right – not a procedural right dictated by court rules. First, the Court need not decide this issue because nothing in KRS § 337.385 (or KRS § 337.395) expressly prohibits class actions. Sullivan continues to add words to KRS § 337.385 to achieve its goal. For example, Sullivan maintains that KRS § 337.385 contains a "limitation on representative actions" and "may only" be maintained in a non-representative capacity. (Respondent Br., p. 16.) KRS § 337.385 contains no such limiting language.

[1] Sullivan's analysis assumes the words "similarly situated" *must* refer to CR 23 class actions as opposed to collective actions or any other group actions. Sullivan fails to mention that the words "similarly situated" are found nowhere in CR 23.01 *et seq*. It is a tortured statutory interpretation indeed to infer the elimination of CR 23 class actions by relying on words in statutes that do not parallel CR 23.

Second, assuming class actions are "substantive" and not procedural, Sullivan ignores KRS § 337.395 which specifically references KRS § 337.385 and clarifies that KRS § 337.385 does not in any way limit workers' rights and remedies. In fact, it affirmatively protects all pre-existing rights.

Third, *Gryzb*, on which Sullivan principally relies, states that where a "statute both declares the unlawful act and specifies the civil *remedy* available to the aggrieved party, the aggrieved party is *limited to the remedy provided by the statute*." *Grzyb v. Evans*, 700 S.W.2d at 401 (emphasis added). Sullivan draws a parallel between the remedy in *Gryzb* and CR 23 as a sort of extra-statutory "remedy." But the "remedy" in *Gryzb* involved *damages* flowing from a violation of KRS § 344.040—not application of court rules. A class action is not a "remedy." It is a court-created joinder device which authorizes "a representative with typical claims to sue on behalf of, and stand in judgment for," a group of similarly situated litigants. *See* Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 1.1 at 2 (4th ed. 2002). This "invention of equity," *see Hansberry v. Lee*, 311 U.S. 32, 41 (1940), "saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (internal citation omitted). Like joinder under CR 19, CR 23 is a creature of the court and its rulemaking authority.

Sullivan's reliance on *Pyro Mining Co. v. Kentucky Comm'n on Human Rights*, 678 S.W.2d 393 (Ky. 1984) is misplaced. The issue in that case was whether CR 23 applied to administrative hearings before the Kentucky Commission on Human Rights. This Court held that CR 23 was incompatible with an administrative proceeding as

opposed to a court proceeding. The opposite is true here. All parties agree that a wage-and-hour claim is filed in circuit court and pursued like any other civil action. Sullivan's reliance on *Bell,* 156 S.W.3d at 321 is equally misplaced. That case confirmed that taxpayers could bring a claim as a class action. The Court distinguished older cases which all flowed from *Swiss Oil Corp*, 270 S.W. 478 (Ky. 1925), a 1925 case which preceded both CR 23 and Section 116 of the Kentucky Constitution.

VII. CLASS ACTIONS EFFECTUATE THE GOALS OF THE WAGE AND HOUR ACT.

Sullivan argues that class actions do not further the remedial goals of the KWHA because the Labor Cabinet may effectively enforce the act. But, as highlighted by the amici, there is a substantial question in this era of shrinking agency funding whether the Labor Cabinet has the resources to effectively police widespread violation of the KWHA. As this Court recognized in *Parts Depot, Inc. vs. Beiswenger*, 170 S.W.3d 354, 358-359 (Ky. 2005), "[u]ndoubtedly, the General Assembly included the liquidated damages provision in subsection (1) and omitted it from subsection (2) as an incentive for employees to hire their own attorneys and pursue their own claims, thereby relieving the commissioner of much of the burden of litigation."

The question of agency efficiency aside, the practical consequences of requiring all Kentucky workers to bring wage claims individually would seriously undermine enforcement and compliance of the Act. In the absence of class actions, wage earners would be deterred from making claims. Few wage claims would be brought because few employees would risk their career to recover a portion of unpaid wages. Conversely, without the fear of potential class action exposure, large employers would have economic incentives to violate Kentucky's Wage and Hour laws. The old adage "it's easier to steal

one dollar from a million people than a million dollars from one person," is apt. Indeed as this Court has recognized, "[e]conomic reality dictates that [litigation involving many small claims] proceed as a class action or not at all." *Schnuerle v. Insight Communs., Co. L.P.*, 376 S.W.3d 561, 568 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) (emph. added). If the class action vehicle is eliminated, the logical consequence will be increased violations of the KWHA and decreased enforcement. Turning the KWHA into a dull sword for Kentucky workers is inconsistent with its policy goals. KRS § 446.080(1), KRS § 337.395.

CONCLUSION

The class-action vehicle is essential to enforcement and inducing compliance with Kentucky's Wage and Hour Act. Sullivan's procrustean interpretation of legislative intent cannot be fit within the purpose and history of the KWHA. KRS § 337.385 is not a new statute. For years it has been interpreted to allow for class actions. The argument that statutes such as KRS § 337.385 contain an "inferred prohibition" on the class action procedure has been roundly rejected by the United States Supreme Court and our sister states. In the current political and economic environment, the rights of Kentucky's wage earners to earn a fair day's pay for a fair day's work should not be abridged.

Respectfully submitted,

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